Court of Appeals, State of Michigan

ORDER

Claude E. Miller v City of Flint

Docket No. 271430

LC No. 01-70776-CZ

Stephen L. Borrello
Presiding Judge

Kathleen Jansen

Jessica R. Cooper
Judges

The Court orders that the February 27, 2007 opinion is hereby AMENDED. The opinion contained the following clerical error: p. 8, third full paragraph, states "poet practice" and should state "past practice".

In all other respects, the February 27, 2007 opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 13 2007
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

CLAUDE E. MILLER, MARK CAMPBELL, and JEFFERY BYE,

Plaintiffs-Appellants,

v

CITY OF FLINT, BOARD OF TRUSTEES PAYROLL & RETIREMENT OFFICE, and MATTHEW GRADY,

Defendants-Appellees,

and

DANIEL HALL, COURTNEY PHILLIPS, SANDRA KIDD, GEORGIA STEINHOFF, ED TAYLOR, AMY LINDMAN, and DANIEL COFFIELD,

Defendants.

UNPUBLISHED
February 27, 2007

No. 271430
Genesee Circuit Court
LC No. 01-70776-CZ

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This appeal arises from a dispute over the City of Flint's (city) method for determining the Final Average Compensation (FAC) for employees who are retiring from the city. The core issues presented in the appeal are (1) whether a retirees' FAC must be based on 26 or 27 pay periods and (2) whether plaintiffs are entitled to select the three years, or 365-day periods, to use in the calculation of their FAC.

A formula using the FAC is used to determine the amount of a city retiree's pension. The formula is as follows:

(Years of Service) x (Multiplier) x (FAC) = Pension Benefit Amount

Section 35-6 of the Retirement Ordinance for the City of Flint defines FAC as follows:

> *FINAL AVERAGE COMPENSATION*. . . shall mean the average of the highest annual compensation paid said members by the City of Flint during any period of three years of his credited service contained within his five years of credited service immediately preceding the date his employment with the City last terminates.

The catalyst for the litigation in this case occurred in 1991, when certain employees retiring from the city began to select non-calendar years to calculate their FAC rather than calculating their FAC by using calendar years. These individuals purposefully selected 365-day periods so that the first and last day of each 365-day period were pay dates, a method which resulted in 27 pay dates per year.[1] Calculating the FAC based on a calendar year would have resulted in the standard 26 pay dates per year.[2]

On June 27, 2001, plaintiffs, retirees from the city, filed a class action lawsuit against the city, the Board of Trustees Payroll and Retirement Office, and individual trustees, on behalf of themselves and other employees who retired between July 1991 and April 2000. The primary allegation in plaintiffs' second amended complaint, which contained six claims,[3] was that the city improperly calculated the FAC of class members[4] by basing the FAC on one or more calendar years with only 26 pay periods.[5] Therefore, according to the complaint, the city failed to comply with Section 35-6 of the Retirement Ordinance of the City of Flint, which requires the FAC to be calculated based on "the average of the highest annual compensation paid said members by the City of Flint during any period of three years of credited service . . . ." According to the second amended complaint, "[d]efendants failed to disclose to Plaintiffs and retiring Plaintiff class members that they could designate multiple 365 day periods (i.e. one year periods), which each included 27 bi-weekly pay days for purposes of determining their highest annual compensation . . . ." Plaintiffs asserted that their FAC should be based on three years

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[1] In March 2000, the city amended the definition of the "annual rate of compensation" in the city's Retirement Ordinance. The amended definition defines "annual rate of compensation" as "A MEMBER'S SALARY OR WAGES EARNED AND RECEIVED ANNUALLY OVER THE COURSE OF 26-PAY PERIODS."

[2] Using 27 pay periods instead of only 26 pay periods in calculating the FAC resulted in an average of a 3.7 percent increase in an employee's pension benefits. *Flint Professional Firefighters Union Local 352*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket Nos. 244953, 244961, 244985), slip op at 3.

[3] The claims that are relevant to plaintiffs' appeal are plaintiffs' breach of contract claim and plaintiffs' claim that defendants' conduct violated Const 1963, art 9, § 24.

[4] In all, plaintiffs claim that the FAC of about 300 city retirees was computed improperly.

[5] Plaintiffs do not dispute that in calculating their FAC, the city used one year with 27 pay periods.

with 27 pay periods and that they should be permitted to select three 365-day periods in order to achieve their highest annual compensation. Among other damages, plaintiffs sought a recalculation of their pension benefits using a FAC based on years that would reflect their highest annual compensation, each with 27 pay periods, as well as payment of retroactive pension benefits.

In March 2005, plaintiffs moved for partial summary disposition under MCR 2.116(C)(10). Plaintiffs sought summary judgment as to the issue of liability regarding their breach of contract claim and claim for violation of Const 1963, art 9, § 24. Plaintiffs argued that they had a contractual right to receive pension benefits and that because the city failed to calculate plaintiffs' FAC using plaintiffs' years of highest compensation, plaintiffs' contractual rights were violated. Plaintiffs further argued that this method of calculating plaintiffs' FAC also impaired their constitutional right under Const 1963, art 9, § 24 to receive pension benefits that had accrued.

In April 2005, defendants city and Matthew Grady[6] also moved for summary disposition under MCR 2.116(C)(8) and (10). Defendants argued, in part, that they were entitled to summary disposition of plaintiffs' breach of contract claim because in *Flint Professional Firefighters Union Local 352*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket Nos. 244953, 244961, 244985) (*Flint Firefighters*), this Court held that the city's Retirement Ordinance and the parties' collective bargaining agreement did not afford city retirees a contractual right to calculate their FAC based on three 365-day periods which all included 27 pay periods. This Court further upheld the holding of the MERC that there was not an established past practice of employees being allowed to select solely 27 pay periods to determine their FAC. Although defendants conceded that this Court, in *Flint Firefighters*, ruled that in calculating the FAC, one year with 27 pay periods could be used,[7] defendants maintained that the city, and not plaintiffs, were entitled to select the years to be used in calculating the FAC. Defendants also argued that plaintiffs' claim that Const 1963, art 9, § 24, was violated should be dismissed because the city's Retirement Ordinance did not provide for a pension benefit based on 27 pay periods and plaintiffs therefore had no contractual right to calculation of their FAC based on years with 27 pay periods. Therefore, according to defendants, there was no diminishment or impairment of plaintiff's pension under Const 1963, art 9, § 24.

On August 31, 2005, the trial court issued an oral opinion.[8] In its opinion, the trial court denied plaintiffs' motion for summary disposition on the breach of contract claim and granted

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[6] Grady is apparently a Retirement Board Trustee.

[7] In *Flint Firefighters*, this Court held that notwithstanding the fact that the retirement ordinance and collective bargaining agreement did not require calculation of the FAC based on years with 27 pay periods, the plaintiffs were nevertheless entitled to have one of the three years used in calculating their FAC to include 27 pay periods because "petitioners presented sufficient evidence to establish a past practice of using twenty-seven pay dates *in at least one year* that is included in an employee's FAC calculation . . . ." *Flint Firefighters*, *supra*, slip op at 7.

[8] A trial court's oral ruling has the same weight and effect as a written order. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996).

defendants' motion. The basis for the trial court's ruling regarding the breach of contract claim was this Court's opinion in *Flint Firefighters*, in which this Court ruled that the plaintiffs had no contractual right to have their FAC calculated based on years with 27 pay periods. The trial court ruled that our holding in *Flint Firefighters* applied to the facts of the case and adopted its analysis. Regarding whether the calculation of the FAC and would be based on years with 26 or 27 pay periods, the trial court stated:

> Plaintiffs have no right to self select three years with 27 pays as a basis of calculating their final average compensation. In accordance with past practice as set forth by the Court of Appeals, plaintiffs are entitled to two 26 pay years and one 27 pay year in calculating their final average compensation.
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> * * *
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> The final average compensation for the plaintiffs shall be computed at [sic] using two 26 pay years and one 27 pay year. The City shall make the selection. The selection shall be made to maximize each individual's retirement. Individual plaintiffs shall be given the opportunity to review the selection and are entitled to amend the selection if the individual can establish a higher final average compensation within the parameters of this decision.

The trial court also granted summary disposition in favor of defendants regarding plaintiffs' claim of a violation of Const 1963, art 9, § 24. On September 8, 2005, the trial court entered a written order denying plaintiffs' motion for summary disposition and granting summary disposition in favor of defendants as to plaintiff's claims for breach of contract and violation of Const 1963, art 9, § 24.

Plaintiffs filed a motion for reconsideration and for clarification of the trial court's September 8, 2005, order. Plaintiffs sought to have the court clarify that a year for FAC purposes is any period of 365 consecutive days, and not necessarily a calendar year, and that the court's September 8, 2005, ruling requires the use of two 365-day periods with 26 pay periods and one 365-day period with 27 pay periods in calculating a retiree's FAC. Defendants also sought clarification of the trial court's September 8, 2005, order, in essence asking for clarification regarding whether defendants' past practice required calculating the FAC based on two years with 26 pay periods and one year with 27 pay periods and a clarification that the city's past practice never involved individual retirees selecting the years of service to use in computing the FAC. The trial court issued a written order on January 3, 2006, stating that it was clarifying the opinion of August 31, 2005, in an oral opinion on the record. In the oral opinion on the record on December 21, 2005, the trial denied plaintiffs' motion for reconsideration and motion for leave to file a third amended complaint. According to the trial court, "a year for final average compensation purposes is any consecutive 365 day period and it is not necessarily a calendar year." The trial court also clarified that "[f]inal average compensation shall be computed as stated earlier in this opinion and as stated in the opinion on August 31, 2005." In the August 31, 2005, oral opinion, the trial court had ruled that the FAC must be computed using two years with 26 pay periods and one year with 27 pay periods. Finally, the trial court instructed defendant to prepare orders "comporting to the decision" and stated that "these orders will be final orders closing these cases."

On January 30, 2006, the trial court held a hearing regarding the terms of the final order and entry of a final order in the case. During this hearing, counsel for plaintiffs argued that the way the city calculated plaintiffs' FAC was improper because the city used the two highest paying calendar years (each with 26 pay periods) and a third hybrid calendar year with 27 pay periods to calculate plaintiffs' FAC. According to plaintiffs, the city never considered using non-calendar year, 365-day periods to determine whether that method would result in a higher rate of compensation, and using the calendar year method did not result in using the years of highest compensation as a basis for calculating plaintiffs' FAC. The trial court put the burden of finding the non-calendar years with the highest compensation on plaintiffs, stating:

> [I]n the final analysis[, plaintiffs] are entitled to get their higher compensation, but they have some responsibility if they intend to pursue it. What's wrong with that?
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> * * *
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> This class of plaintiffs have received notice of this litigation. I think the court rule provides they are to get notice of the resolution, and included within that notice can be a statement to the effect that if you believe and can substantiate that your retirement would be greater using non-calendar years as permitted under the Court of Appeals' decision and my ruling, then you are entitled to knock on the door at City hall and plead your case. But I'm not going to require the City to recalculate these pensions . . . .

On June 22, 2006, the trial court entered the final order disposing of the case. In this order, the trial court granted defendants' motions for summary disposition and dismissed the case with prejudice. In this order, the trial court stated:

> **IT IS FURTHER ORDERED** that, consistent with the Court's previous rulings and the rulings of the Court of Appeals on the issues which are the subject of this action, from this date forward, the City of Flint, through the appropriately designated office or official, shall make the selection of years in determining retiring employees' final average compensation (FAC); such selection shall be made to maximize the employees' retirement benefits.
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> **IT IS FURTHER ORDERED** that the City of Flint is not required to recalculate the previously-determined FAC for the members of the class which initiated the instant litigation.
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> **IT IS FURTHER ORDERED** that an employee is entitled to challenge the City's selection *only if* the employee can demonstrate that another method of selection or calculation, within the confines of the decision of the Court of Appeals on this matter, would result in a higher benefit to the employee.
>
> **IT IS FUTHER ORDERED** that a "year" for FAC purposes is any consecutive 365 day period and is not necessarily a calendar year.

On August 14, 2006, the trial court entered an order clarifying the June 22, 2006, order. The clarification order stated: "A class member is entitled to challenge the City's selection of

years used to compute FAC *only if* the class member can demonstrate that another method of selection or calculation, within the confines of the Court of Appeals decision on this matter, would result in a higher benefit to the class member."

II. STANDARDS OF REVIEW

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Memorial Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), lv pending 477 Mich 859 (2006).]

This Court will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion that results in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

III. ANALYSIS

A. Summary Disposition

1. Breach of Contract Claim

Plaintiffs argue that the trial court erred in denying their motion for summary disposition of their breach of contract claim against defendants. In support of their argument, plaintiffs assert that the city's Retirement Ordinance, which is incorporated into the collective bargaining agreements applicable to plaintiffs, provides that a retiree's FAC can be calculated using any 365-day period and is not necessarily a calendar year. Plaintiffs further assert that the Retirement Ordinance requires that the FAC be based on the years with the "highest compensation." Therefore, plaintiffs contend that based on the language in the Retirement Ordinance and their collective bargaining agreement, the city's calculation of plaintiffs' FAC constituted a breach of contract.

The trial court rejected plaintiffs' breach of contract argument in an oral opinion on the record:

> Taking first the motion which alleges entitlement to summary disposition on a breach of contract claim, plaintiffs claim they are entitled to self select three years with 27 pays to determine their final average compensation. . . . Plaintiffs argue that the undisputed evidence establishes that annual compensation refers to any period of 365 days and not just a calendar year.
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> * * *
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> Plaintiffs further urge that this Court should consider the attempt by the Board of Trustees to five [sic] life to the 27 pay period as further evidence of past practices. I would note that the efforts of the Board of Trustees was rejected by City council.
>
> Plaintiffs further urge that because the City allowed individuals to self select 27 pay years for determining final average compensation, that I am bound to follow that practice. I would note that the individuals who did select 27 pay periods per year in their final average compensation calculations have another case pending in front of me because that calculation was altered after the City council amended the ordinance.
>
> In my opinion, the arguments advanced in support of the motion for summary disposition on a breach of contract theory are the same arguments rejected by the Court of Appeals. Regardless of whether I am bound by the decision of that unpublished opinion, I believe the analysis is basically correct and I adopt it here.
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> * * *
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> With respect to the motion for breach of contract I find as follows. Plaintiffs have no right to self select three years with 27 pays as a basis of calculating their final average compensation. In accordance with past practice as set forth by the Court of Appeals, plaintiffs are entitled to two 26 pay years and one 27 pay year in calculating their final average compensation.
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> As to the issue of who selects the years, a clear cut resolution factually from the past history is not clear to me from the evidence presented and from the evidence presented in the Court of Appeals. But in my view, it should not matter who selects, as long as it is agreed that the purpose of the selection is to maximize the final average compensation for each individual retiree.
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> * * *
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> The final average compensation for the plaintiffs shall be computed at using two 26 pay years and one 27 pay year. The City shall make the selection. The selection shall be made to maximize each individual's retirement. Individual

> plaintiffs shall be given the opportunity to review the selection and are entitled to amend the selection if the individual can establish a higher final average compensation within the parameters of this decision.

In *Flint Firefighters*, another group of retirees from the City of Flint brought suit against the city, challenging, as in this case, the city's calculation of their FAC. The plaintiffs sought to have the court determine, in part, "whether the language of the City of Flint's Retirement Ordinance [as incorporated into the parties' collective bargaining agreements] allows for twenty-seven pay dates to be used in calculating a retiree's final annual compensation . . . ." *Id.*, slip op at 2. The relevant provisions of the city's Retirement Ordinance in *Flint Firefighters* are identical to the provisions at issue in this case. This Court held that the plaintiffs did not have a contractual right to select 365-day periods that included 27 pay periods, reasoning:

> Accordingly, petitioners' contention that the 27th pay date should be included in this figure, because (1) twenty-six pay dates only represent 364 days of a year period, and (2) the contract language states "annual compensation paid," not paid and earned, must fail. . . . To accept petitioners' reasoning would be to ignore this definition. This we cannot do. A contract should be construed to avoid an interpretation that would render any part surplusage or nugatory. . . . [*Id.*, slip op at 5 (footnote omitted)].

While we recognize that we are not bound by our unpublished opinion in *Flint Firefighters*, we are persuaded by the rationale utilized by our colleagues in that case and adopt the reasoning as set forth in their opinion. We are however, bound by the prior holding of the MERC which held that employees failed to establish a poet practice of selecting only 27 week pay periods. Therefore, we hold that the trial court did not err in holding that plaintiffs in this case did not have a contractual right to base their FAC on three 365-day periods, each with 27 pay periods. This Court specifically rejected this argument in *Flint Firefighters*. We do observe, however, that in *Flint Firefighters*, we held that based on the city's past practice of using one year with 27 pay dates in calculating the employees' FAC, the employees were "entitled to a FAC calculation using twenty-seven pay dates in *one of the three best years* in accordance with the City's past practice." *Id.*, slip op at 11. In fact, in the instant case, plaintiffs' FAC were determined using one year with 27 pay periods. To this extent, the city's actions complied with our holding in *Flint Firefighters*.

Plaintiffs take issue with the relief granted by the trial court in this case. We hold that for the same reasons set forth in *Flint Firefighters*, the relief granted by the trial court was proper. First, the trial court's June 22, 2006, order held, as plaintiffs sought to have it hold, that a "year" for FAC purposes is any consecutive 365-day period and not necessarily a calendar year. This ruling provides flexibility and assures that the city's Retirement Ordinance which requires that the FAC is based on "the average of the highest annual compensation paid" to the retiree, is satisfied. In addition, plaintiffs take issue with the fact that the trial court did not permit the retirees themselves to select the three 365-day periods for purposes of calculating their FAC. The trial court's orders granted the city, and not plaintiffs, the right to select the 365-day periods to be used in calculating a retiree's FAC. However, both the June 22, 2006, order and the order of August 14, 2006, specifically grant the retirees the right to challenge the city's selection of 365-day periods. Although these two orders place the burden of selecting 365-day periods that would result in a higher benefit to the retiree upon the retiree, this procedure is sufficient to

ensure that plaintiffs' FAC are based on "the average of the highest annual compensation" paid to the retiree as required by the Retirement Ordinance and collective bargaining agreement. Therefore, if a retiree selected three 365-day periods within the parameter of the trial court's ruling that resulted in higher annual compensation, the city would, and we so hold that pursuant to the order of the trial court and this Court, the city would be required to accept the retiree's selection and use it in determining the retiree's FAC.

Because we are satisfied with the trial court's ruling and order allowing retirees an opportunity to redress any discrepancies between a retiree's and the city's calculation of the "highest annual compensation," we reject plaintiffs' contention that the trial court erred in refusing to require the city to recalculate all of the plaintiffs' FAC. While plaintiffs are correct in their assertion that the trial court's June 22, 2006, order specifically states that the city is not required to recalculate plaintiffs' FAC, the order specifically permits plaintiffs to determine for themselves which 365-day periods will result in the years with the highest compensation. Conversely, because the order is silent regarding whether the retiree or city is to select the dates used in determining a retiree's FAC, the trial court's opinion, which allows both sides to participate, ensures a more orderly and thoughtful process, while at the same time protecting the rights of retirees.

Plaintiffs also contend that there is no way to enforce the trial court's relief in favor of plaintiffs because the trial court granted defendants' motion for summary disposition and dismissed the case. A trial court speaks through its written orders. *People v Davie (After Remand)*, 225 Mich App 592, 600; 571 NW2d 229 (1997). As previously stated, the trial court's decision to grant summary disposition of plaintiffs' breach of contract and violation of Const 1963, art 9, § 24 claims was proper based on this Court's adoption of the reasoning in our prior opinion in *Flint Firefighters*. Here plaintiffs have somewhat eschewed the trial court's order. While we agree with plaintiffs that the trial court granted defendants' motion for summary disposition, the trial court also awarded relief to plaintiffs, making the relief enforceable in a subsequent action. The trial court ruled that plaintiffs' FAC should be based on 365-day periods and not merely calendar years if 365-day periods would result in years with a higher annual compensation and that one of the three 365-day periods used to calculate the FAC could include 27 pay periods. The trial court's ruling also permitted plaintiffs to challenge the city's selection if a plaintiff could demonstrate that another method of calculating the FAC would result in a higher pension benefit. Notwithstanding the fact that the trial court's order granted summary disposition to defendants, plaintiffs would be entitled to enforce the favorable provisions of the trial court's orders. To underscore this point, we note that in October 2006, plaintiffs sought, and were granted, relief after the city failed to properly respond to plaintiffs' attempts to enforce the trial court's orders which permitted retirees to obtain information from the city to determine their years of highest compensation. On December 21, 2006, the trial court determined that the city's response to plaintiffs was "incorrect and does not comport with the decision reached in this matter" and gave the city specific instructions regarding the city's compliance with the trial court's orders. Thus, we conclude that the trial court's response to the city's conduct affirms plaintiffs' ability to enforce the trial court's orders notwithstanding the fact that the trial court granted summary disposition in favor of the city.

2. Violation of Const 1963, art 9, § 24 Claim

Plaintiffs also argue that the trial court erred in denying plaintiffs' motion for summary disposition of plaintiffs' claim that the city violated Const 1963, art 9, § 24 by computing retirees' FAC using calendar years with only 26 pay periods instead of basing the calculation of the FAC on 365-day periods with 27 pay periods. The problem with the city's calculation method, according to plaintiffs, is that the city's use of calendar years did not ensure that retirees' FAC were based on the years of highest compensation as required by the Retirement Ordinance. According to plaintiffs, by computing their FAC in this manner, the city diminished or impaired plaintiffs' constitutional right to receive the accrued financial benefits of their pension plan. Const 1963, art 9, § 24.

Const 1963, art 9, § 24 provides: "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." In denying plaintiffs' motion for summary disposition and granting defendant's motion on this issue, the trial court stated:

> Moving on to plaintiffs' constitutional claims, I find that they fail as well. Implicit in plaintiffs' claim is that they must be entitled to the benefit they claim has been taken by a violation of their constitutional rights. For the reasons previously stated in this oral opinion, the plaintiffs were not so entitled. Their constitutional rights under article 9, section 24 of the Michigan Constitution have not been violated. Plaintiffs['] motion for summary disposition on this issue is denied and, further, pursuant to MCR 2.116(i)(2), I find the City of Flint and Matthew Grady to be entitled to summary disposition on this issue, and I so order.

Const 1963, art 9, § 24 only applies to "accrued financial benefits." In *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 662-663 (1973),[9] our Supreme Court construed the term "accrued financial benefits" as the right to receive pension payments upon retirement for services performed based upon the framers' intent expressed at the 1961 Constitutional Convention. In this case, the city's Retirement Ordinance, as incorporated into the parties' collective bargaining agreement, defines FAC as "the average of the highest *annual compensation* paid said members by the City of Flint during any period of three years . . . ." [Emphasis added.] In *Flint Firefighters*, we held that under the definition of FAC, plaintiffs only accrued financial benefits for 26, not 27, pay periods in a year and rejected the notion that the language in the Retirement Ordinance defining FAC requires the use of years, or 365-day periods, with 27 pay dates in calculating the FAC. According to the court: "[t]he 27th pay date represents monies received for work done in a different year period, which conflicts with the definition of annual compensation." *Flint Firefighters*, slip op at 5. We therefore conclude that the city was enforcing the plain language of the contract as well as the established past practice in using two years with 26 pay periods (and one year with 27 pay periods) as a basis for determining plaintiffs' FAC. Therefore, because plaintiffs did not have a contractual right to

[9] Advisory opinions of the Supreme Court are not considered binding authority, but may be followed as persuasive authority. *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 460-462 n 1 (1973).

calculate their FAC based on three years, or 365-day periods, with 27 pay periods, they did not accrue financial benefits for a pension based on 27 pay periods per year, and the city's calculation of plaintiffs' FAC based on calendar years with 26 pay periods did not violate Const 1963, art 9, § 24.[10]

B. Leave to Amend Complaint

Plaintiffs next argue that the trial court abused its discretion in denying its motion to file a supplemental pleading or a third amended complaint.

Plaintiffs moved for leave to file a supplemental pleading under MCR 2.118(E). MCR 2.118(E) permits the trial court to allow a party "to serve a supplemental pleading to state transactions or events that have happened since the date of the pleading sought to be supplemented . . . ." According to plaintiffs' brief in support of the motion, the "proposed supplemental pleading seeks to state events that have occurred since the filing of Plaintiffs' Second Amended Complaint . . . [and] does ***not*** seek to add any parties or causes of action . . . ." The primary event that was the impetus for the supplemental pleading is this Court's decision in *Flint Firefighters*. Plaintiffs argued that *Flint Firefighters* did not apply to this case but that even if *Flint Firefighters* did apply, plaintiffs were still entitled to relief because defendants computed plaintiffs' FACs using calendar years rather 365-day periods. The trial court denied plaintiffs' motion to file a supplemental pleading.

Thereafter, plaintiffs moved to file a third amended complaint under MCR 2.118(A)(2) in February 2005. The third amended complaint advanced essentially the same grounds advanced by plaintiffs in seeking to file a supplemental pleading: this Court's decision in *Flint Firefighters*. The third amended complaint did not seek to add new parties or state any new claims. Citing a desire to exercise caution, plaintiffs explained in their brief in support of their motion to file a third amended complaint that "Plaintiffs seek to amend to explicitly claim relief under the Court of Appeals decision if that decision is found to apply." At a hearing on December 21, 2005, the trial court denied plaintiffs' motion for leave to file a third amended complaint, stating: "Given the decision of the Court of [A]ppeals and the resolution made in this case, such an amendment would be futile."

MCR 2.118(A)(2) provides that "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." A motion to amend a pleading should ordinarily be granted. *Sands Appliance Services, Inc v*

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[10] Defendants contend that plaintiffs, as a class, could not bring a claim under Const 1963, art 9, § 24, because that provision is intended only to grant rights to individuals, and not to a class of plaintiffs. In light of our conclusion that plaintiffs' rights under Const 1963, art 9, § 24, were not violated, we need not address defendants' argument. Courts will not engage in constitutional interpretation that is unnecessary to the disposition of the case at hand. See *Taylor v Auditor General*, 360 Mich 146, 154; 103 NW2d 769 (1960), rev'd in part on other grounds 468 Mich 763 (2003) ("[F]ew principles of judicial interpretation are more firmly grounded than this: a court does not grapple with a constitutional issue except as a last resort.").

Wilson, 463 Mich 231, 239; 615 NW2d 241 (2000). Motions to amend should only be denied for particularized reasons, including undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party if the amendment is allowed, or futility. *Id.* at 239-240. An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990). An amendment is also futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998).

Here, we cannot find that the trial court abused its discretion in denying plaintiffs' motion to file a third amended complaint. The proposed third amended complaint did not add any new claims or parties. It was nearly identical to the second amended complaint except that it contained a section addressing this Court's opinion in *Flint Firefighters* and in each of the six claims and in other allegations, the proposed third amended complaint sought the following modified relief if the trial court determined that *Flint Firefighters* applied: "if the Court of Appeals decision is applied, a final average compensation based on the two years with 26 pays and one year with 27 pays[.]" Therefore, because the proposed third amended complaint merely restates, or slightly elaborates on, allegations already pleaded, and because summary disposition in favor of defendants was appropriate, we concur with the trial court's conclusion that allowing plaintiffs leave to amend for a third time would be futile. *Dowerk, supra* at 76.

Moreover, plaintiffs concede in their brief on appeal that the relief sought in their second amended complaint "was broad enough to capture any remedy available under this Court's June 17, 2004 decision." The second amended complaint had a catchall relief section which sought "other legal and equitable relief as is deemed just and proper." This language is broad enough to encompass calculating the FAC based on two years with 26 pay periods and one year with 27 pay periods, which was the holding in *Flint Firefighters*. Furthermore, even without plaintiffs' proposed third amended complaint, the trial court has discretion to grant relief even if that relief is not specifically requested in the complaint. MCR 2.601(A) provides that except in the case of a default judgment, "every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings." Therefore, it was unnecessary for plaintiffs to file a third amended complaint to modify the relief sought because the trial court could have granted relief based on this Court's holding in *Flint Firefighters* even if such relief was not requested by plaintiffs.

Even if the trial court did abuse its discretion in denying leave to amend plaintiffs' complaint, any error in this regard is subject to a harmless error analysis. See *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 144-145; 715 NW2d 398 (2006). An error in denying leave to amend a complaint is harmless if nothing in the proposed amendments would have averted summary disposition. *Id.* at 144. In this case, nothing in plaintiffs' proposed third amended complaint, which primarily added information about this Court's opinion in *Flint Firefighters* and amended the relief sought by plaintiffs in light of *Flint Firefighters*, could have avoided summary disposition of plaintiffs' claims for breach of contract and violation of Const 1963, art 9, § 24. To the contrary, this Court's decision in *Flint Firefighters* actually supported defendants' motion for summary disposition of plaintiffs' breach

of contract and violation of Const 1963, art 9, § 24 claims. Therefore, any error in the trial court's denial of leave to amend plaintiffs' complaint was harmless.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper